

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 98 B 103

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

AUSTIN GIBSON,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
REGENTS OF THE UNIVERSITY OF COLORADO,

Respondent.

THIS MATTER was heard in evidentiary hearing before Administrative Law Judge Michael S. Gallegos, on April 24, 1998 at approximately 9:15 A.M., at 1525 Sherman Street, Room B-65, Denver, Colorado. Respondent was represented by Assistant University Counsel Ms. Elvira Strehle-Hensen. Complainant was represented by Mr. William E. Benjamin, Attorney at Law.

MATTER APPEALED

Complainant appeals a disciplinary termination of employment. For the reasons set forth below, **Respondent's actions are affirmed.**

PREHEARING MATTERS

1. Complainant did not appear at hearing. This matter was continued once before, on the date of hearing, for Complainant's failure to appear. On the first hearing date, March 26, 1998, Complainant's Counsel appeared ready for hearing and indicated that, while his services had been engaged to represent Complainant in this matter, he had been unable to contact Complainant recently. After waiting approximately one-half (1/2) hour for Complainant, Complainant's Counsel moved for a continuance. A continuance was granted in order to allow Complainant's Counsel to locate Complainant and determine how to proceed. By written order Complainant's Counsel was directed to file with a Motion to Reschedule Hearing or Complainant's Motion to Withdraw Appeal/Dismiss with Prejudice on or before April 2, 1998.

On April 1, 1998 Complainant's Counsel filed a Motion to Reschedule Hearing in which Counsel stated that he had been in contact with Complainant and Complainant

“wished to continue to pursue his complaint.” The Motion did not state the reason for Complainant’s failure to appear on the first hearing date. The Motion was granted without objection from Respondent and a new hearing day was set.

On the new (second) hearing date, April 24, 1998, Complainant’s Counsel appeared ready for hearing and indicated that he expected Complainant to appear but that if he did not, Counsel had Complainant’s authorization to proceed to hearing in his absence. Commencement of the hearing was delayed until approximately 9:15 AM waiting for Complainant. Complainant did not appear at any time during the hearing.

2. Exhibits - Respondent’s Exhibits I through 6 were accepted without objection.

3. Witnesses - Respondent called the following witnesses: Ms. Deborah Brew, Dining Service Manager at Kittredge Dining Center; Mr. Richard Hennessy, Assistant Director of Housing for Dining Services; Lieutenant Michell Irving, University of Colorado Police Department.

No witnesses were called on behalf of Complainant and Complainant did not appear to testify on his own behalf.

ISSUES

1. Whether Complainant committed the act(s) which gave rise to the disciplinary action.
2. Whether Complainant’s action warranted disciplinary termination.
3. Whether Respondent’s action(s) was arbitrary, capricious or contrary to rule or law.
4. Whether Complainant is entitled to costs including attorney’s fees.

FINDINGS OF FACT

1. Complainant was employed by University of Colorado at Boulder (CU) Dining Services as a Food Service Worker II. He worked at the Kittredge Dining Center and had supervisory duties over other staff
2. Complainant’s duties were not confined to the kitchen area or the dining hall. His duties included setting up special events in the “commons” area of Kittredge Dining Center, e.g. cookouts, ice cream socials, pizza parties, day care parties, and setting up meeting rooms for conferences scheduled at Kittredge Dining Center.
3. During the academic year, Kittredge Dining Center serves three (3) meals

per day, seven (7) days per week to college students, who reside in CU residence halls, and their guests, some of whom are under the age of 18 (eighteen) years.

4. Throughout the year Kittredge also provides meals for conferences and camps whose participants stay in the CU residence halls. Many of the participants, especially for the summer camps, are children under the age of 18 (eighteen) years. The camps are most often athletic camps, e.g. tennis camp, lacrosse camp, cheerleading camp with 20 (twenty) to 400 (four hundred) participants between the ages of 8 (eight) and 18 (eighteen) years of age.

5. In addition to minors (persons under the age of 18 (eighteen) years) that Kittredge actually serves, the Kittredge Dining Center area draws many other minors, e.g. There is a planetarium across the street and an events center on the same street. Bus loads of children come to the planetarium. Many picnic on the grassy areas around Kittredge. There are many events scheduled in the area including events for CU employees and their families, including employees' minor children.

6. Because Complainant's work hours were 12:00 Noon - 9:00 P.M. or 1:00 - 10:00 P.M. and other staff left by 7:45 P.M., Complainant was often alone in the Kittredge Center.

7. Ms. Deborah Brew, Dining Service Manager at Kittredge Dining Center, hired Complainant and was his supervisor during his employment at Kittredge.

8. Complainant did not state, nor was Ms. Brew aware, at the time of interview and hiring, that Complainant had a felony conviction.

9. Ms. Brew was made aware of the felony conviction by a staff member who found Complainant's name listed in the newspaper as a sex-offender.

10. When Ms. Brew asked Complainant about the conviction, Complainant told her that it was a one-time offense, about six (6) years ago, involving alcohol problems. He did not mention probation.

11. Lieutenant Irving is in charge of the detective division, i.e. in charge of investigations, for the University of Colorado Police Department. She supervises Sergeant Madrid who regularly checks the sex-offender lists published for the Boulder and Longmont areas. Upon finding Complainant's name in the December, 1997 list, Lt. Irving requested a copy of the police report regarding Complainant's sex-offense convictions.

12. Mr. Hennessy, Assistant Director of housing for Dining Services, is Ms. Brew's supervisor.

13. Complainant's felony convictions for sexual assault were brought to Mr.

Hennessey's attention by Mr. Hennessey's supervisor, Housing Director Susie Campbell.

14. Mr. Hennessey requested a police report on the matter and reviewed the report during winter break, December 1997 into January 1998, while the university residence halls were closed.

15. The police report indicated that Complainant's sex offenses may have occurred at three locations in Colorado and in two other states, including work situations. The police report indicated that one instance of sexual assault on a minor took place in a van at his workplace. The report indicated there were a number of children assaulted. (Respondent's Exhibit 1.)

16. Mr. Hennessey gave a copy of the police report on Complainant's felony conviction to Ms. Brew. (Respondent's Exhibit 1.)

17. The police report indicated, contrary to what Complainant told Ms. Brew, that the sex offense was not a one-time offense. Rather it was on-going over a period of years and involved his daughter and possibly other minors.

18. Upon reading the police report, Ms. Brew began to have serious concerns regarding the appropriateness of Complainant working at Kittredge Center.

19. Prior to reading the report Ms. Brew had no concerns regarding Complainant. She "thought highly" of Complainant's work. She did not observe any problems and there were no complaints against Complainant.

20. Two (2) separate R833 meetings were held in this matter on January 9, 1998 and January 23, 1998. A second R833 meeting was scheduled in order to give Complainant the opportunity to get more information from his therapist and his probation officer. (See Respondent's Exhibit 3.)

21. Complainant's therapist, Pamela J.S. Rodden Ph.D., indicated that loss of his job would have a negative impact on Complainant's mental health status. He "appeared much more improved since his job at the college." However, she also stated that Complainant had "been able to make major life style changes in order to place others and himself at minimal risk of re-offense. Mr. Gibson has learned avoidance techniques in order to stay away from children and places where they congregate.. It is my understanding that Mr. Gibson was working in the kitchen area with individuals older than eighteen years of age..." (Respondent's Exhibit 4.)

22. Complainant's probation officer, T.J. Leigh reported that Complainant was sentenced to eight (8) years probation, in July, 1992, after conviction for two counts of sexual assault on a child. Conditions of probation include treatment and no contact with children under the age of eighteen (18) years. Specifically his probation officer stated, "His condition of no contact with minors is an important one. His employment with the

University of Colorado met his Probation and treatment requirements regarding this condition as he worked with adults in a place not routinely frequented by children.” (Respondent’s Exhibit 5.)

23. Complainant was convicted of two counts of sexual assault, served three (3) years and two (2) months in Colorado Department of Corrections’ facility or facilities and released on condition of probation.

24. During the R833 meeting Complainant downplayed his offenses saying it was a private matter, alcohol related.

25. The appointing authority considered the written reports of both Complainant’s therapist and probation officer but he did not contact either by telephone or in person. He considered the fact that there were no assurances that Complainant would not re-offend. He considered the large number of minors coming into Kittredge on a regular basis, the large numbers of minors that frequented the area and the significant opportunity for Complainant to re-offend during times when he was unsupervised in the Kittredge Center.

26. The appointing authority reviewed other employee/sex-offender cases, i.e. similar cases that had occurred in the past, e.g. Lt. Irving reported that in 1987 CU had employed a food service worker who would leave his work site to roam the halls of the dormitories (residence halls) and enter the dormitory showers.

27. The appointing authority also considered the manner and degree to which Complainant had mischaracterized his felony convictions and that he did not initially advise Ms. Brew regarding his convictions, nor did he ever advise her regarding his on-going probation and the conditions of probation.

28. The appointing authority considered Complainant’s good work performance.

29. The appointing authority considered alternatives to termination such as transfer to another dining hall. However, transfer was not a realistic option because all CU dining halls have multiple summer programs that involve minors and during the regular academic year there are minors in the dining halls because some CU students are under eighteen (18) years old and some guest of the CU students are minors. In order to accommodate Complainant’s duties Dining Services would have to restrict those who could eat at Kittredge to persons over the age of eighteen (18) years.

30. The appointing authority considered that CU dining halls were moving toward a “restaurant concept” in which increased numbers of students would work for Dining Services and with more opportunity for minors to be in the dining halls throughout the year.

31. The police report (Respondent's Exhibit 1.) also indicated that the sexual assaults on Complainant's daughter began when she was approximately five (5) years old, involved almost daily contact¹ of a sexual nature, including vaginal penetration with various objects, through the time of Complainant's arrest when she was fourteen (14) years old and, on occasion, involved contact of a sexual nature with Complainant's daughter's friends. The report further indicated that Complainant began to have sexual intercourse with his daughter when she was approximately nine (9) years old. On occasion, according to the report, she would try to defend herself against Complainant's sexual advances and she would physically harm him. He would physically harm her if she threatened to tell or tried to refuse.

DISCUSSION

Complainant's attorney argues Colorado law, Section 24-5-101 C.R.S. 1998, provides that a felony conviction for a sexual offense *in and of itself shall* not effect employment (emphasis added), i.e. is insufficient grounds for termination. Therefore, the question in this matter is whether there were any other reasonable grounds which would warrant termination of Complainant's employment as a food service worker in the CU dining halls.

Complainant's conviction on two counts of "sexual assault on a minor by a person in a position of trust" is a matter of public record. He served slightly more than three years in prison and was released on condition of probation. The conditions of his probation were treatment and no contact with persons under the age of eighteen (18) years. Complainant, as per such requirement, remained in treatment and, according to his therapist, made progress in addressing issues of sexual aggression and self-esteem. However, it is clear from the very specific language of both Complainant's therapist's letter (Respondent's Exhibit 4.) and Complainant's probation officer's letter (Respondent's Exhibit 5.) that he did not tell either his therapist or his probation officer about the numbers of minors with whom he came in contact as part of his job.

We must assumed that Complainant knew of the requirement to have no contact with minors. Both his therapist and his probation officer knew of the requirement; it would have been articulated to him or given to him in writing on any number of occasions including sentencing, probation intake and as part of his on-going treatment. Yet he failed to mention his probation and on-going requirements to his supervisor Ms. Brew, not only at interview but, at the time she specifically questioned Complainant regarding his felony conviction for a sexual offense.

At the R833 meeting Complainant down played the sexual offense but the police report was clear. Complainant had been accused of "molesting" children over a period of years at any location he could find. Although, it appears, his conviction was limited to

¹ except for two months in which Complainant's daughter lived with her uncle.

sexual assaults on his daughter, Complainant continued to omit the opportunity for re-offending to his therapist, his probation officer and, perhaps, even to himself. The letters from Complainant's therapist and probation officer were generally supportive of Complainant's seeming progress but even those documents reiterated the need for Complainant to have no contact with minors.

It was reasonable for the appointing authority to consider Complainant's conditions of probation and the fact that he omitted these conditions both in his hiring interview and upon questioning by Ms. Brew. Any reasonable person would also consider the significant number of minors passing through Kittredge Dining Center and the surrounding area or any of the other CU dining facilities, i.e. the frequent opportunity for Complainant to re-offend while he was employed with Dining Services.

The appointing authority considered not only Complainant's convictions in deciding to terminate employment; he also considered Complainant's omissions in reporting to his supervisor, his therapist and his probation officer. Complainant's reporting omissions are the actions which give rise to this disciplinary termination. His less-than-truthful actions and attitude imply that Complainant was trying to place himself in a position where he again had access to minors for contact of a sexual nature. Even if that was not Complainant's goal, he was in violation of his conditions of probation by working for CU Dining Services and having actual and potential contact with minors. Therefore, Section 24-5-10 1 C.R.S. 1998 is not applicable because Complainant's disciplinary termination was based on Complainant's actions in *addition to* his conviction.

The appointing authority reasonably considered the possibility of Complainant's continued employment, e.g. transfer, demotion. He also reasonably considered the effect of continued employment on the University and the University community including minors. His decision to terminate Complainant's employment was reasonable and within the range of alternatives available to him and, therefore, was neither arbitrary nor capricious.

CONCLUSIONS OF LAW

1. Complainant was convicted of two counts of "sexual assault on a minor by a person in a position of trust", served three (3) years and two (2) months in Colorado Department of Corrections' facility or facilities and was released on condition of probation. One of the conditions of probation in Complainant's case was no contact with minors. Complainant was on probation at the time of his hire and throughout his employment with University of Colorado at Boulder (CU) Dining Services. Complainant failed to inform his supervisor or anyone else in Dining Services of his felony conviction, his probation or the probation condition that he have no contact with minors.

2. There were no other reasonable options, to termination of Complainant's employment, that would insure he have no contact with minors. Complainant's failure to

notify his supervisor, his therapist or his probation officer of his violation of probation conditions and the opportunity for re-offending warranted his termination.

3. The appointing authority considered all mitigating and aggravating information within his control or presented to him, including the possible consequences of continued employment and made a decision that was within the reasonable alternatives available to him. His decision was not arbitrary, capricious not contrary to Section 24-5-101 C.R.S. 1998 or any other rule or law.

4. Complainant is not entitled to costs including attorneys fees.

ORDER

The actions of Respondent are **affirmed**.

Dated this 8th day
of June, 1998
at Denver, Colorado

Michael S. Gallegos
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any

transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-IO-5, 4 CCR 801-1.

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on this ____ day of June, 1998, I placed true copies of the foregoing INITIAL DECISION in the United States mail, postage prepaid, addressed as follows:

Mr. William Benjamin
Attorney at Law
2737 Mapleton Ave., #103
Boulder, CO 80304

and in the interoffice mail to:

Ms. Elvira Strehle-Hensen
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